the shadow. Is the sum total of the experience gained by the petitioner in actual service likely to be so materially enhanced by one more month of reading in chambers that it ought to be treated as indispensable to his qualification? I do not think so. An appointment in the Judicial and Legal Service is not something that ordinarily comes the way of those who have been called to the Bar. In that sense it may be considered as a special ground provided that the appointment was one proven to have afforded the requisite experience and knowledge of law and practice. The petitioner's fitness having been certified by the board of examiners, I should, as it were, be straining at a gnat to swallow a camel if I should withhold exercise of my discretion for nothing. A few days more or less can make no difference: *de minimis non curat lex.*

Accordingly the prayers in the petition will be allowed and the petitioner admitted and enrolled as an advocate and solicitor of the High Court in Malaya.

Petition allowed.

LIAN SENG CONSTRUCTION CO. v. YUZIN

[O.C.J. (Syed Agil Barakbah J.) August 30, 1969]

[Kuala Lumpur — Civil Suit No. 22283 of 1965]

Contract — Building contract — Arbitration — Position of architect — Arbitrator or quasi-arbitrator — Failure of arbitrator to give written decision in disputes or differences — Whether bar to arbitration — Final certificate — Effect of certificate — Estoppel — Arbitration Ordinance, 1950, s. 5.

The defendant applied for stay of proceedings in an action by the plaintiff, a building contractor, pursuant to section 5 of the Arbitration Ordinance. One of the grounds of opposition to the application was that the provisions of the building contract requiring the arbitrator to give a written decision on disputes or differences had not been complied with.

Held: (1) the arbitration clauses in this case were wide enough to give jurisdiction to the arbitrator to go into the disputes which had arisen and to supply the deficiency that has occurred, i.e., the non-fulfilment of a condition precedent by the architect in that he had failed to give a written decision in the dispute;

(2) the plaintiff had failed to show sufficient reason why the disputes should not be referred to arbitration and therefore the application for stay of proceedings will be allowed.

Cases referred to:—

(1) *Lim Su Sang* v. *Teck Guan Construction and Development Co. Ltd.* [1966] 2 M.L.J. 29.

(2) *Willesford* v. *Watson* (1873), L.R. 8 Ch. App. 473, 480.

(3) *Lan You Timber Co.* v. *United General Insurance Co. Ltd.* [1968] 1 M.L.J. 181 p. 182.

(4) *Re Carus-Wilson & Greene* (1886), 18 Q.B.D. 7, C.A.

(5) *Pawley* v. *Turnbull* (1861), 66 E.R. 327.

(6) *Hickman & Co.* v. *Roberts* [1913] A.C. 229.

(7) *Smith Construction Co. Ltd.* v. *Phit Kirivatna* [1955] M.L.J. 8.

(8) *Bristol Corporation* v. *Aird & Co.* [1911-13] All E.R. Rep. 1076.

(9) *Freeman & Sons* v. *Chester Rural District Council* [1911] 1 K.B. 783.

(10) *Prestige & Co. Ltd.* v. *Brettell* [1938] 4 All E.R. 346.

(11) *Brodie* v. *Cardiff Corporation* [1919] A.C. 337.

CIVIL SUIT

K.L. Devaser for the plaintiff.

Mrs. S.B. Menon for the defendant.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an application by the defendant for an order that the proceedings in this action be stayed pursuant to section 5 of the Arbitration Ordinance, 1950. On 3rd January, 1969, the plaintiff company applied for an order that the plaintiff be at liberty to sign judgment against the defendant for $19,449 being the balance of the price for work done and materials supplied for a building on the defendant's land in Lot No. 201, section 43, Jalan Ampang, Kuala Lumpur. The plaintiff and the defendant entered into a written contract on 16th November, 1966, whereby the plaintiff agreed to erect and complete a residential building on the defendant's land according to drawings and specifications therein contained for a sum of $57,325. For the purpose of the said contract the defendant engaged an architects' firm known as Architects Team 3 having their office at A.I.A. Building, Kuala Lumpur.

The defendant entered an appearance and then without taking any further step applied to have the proceedings stayed on the ground that what was involved were disputes in connection with the agreement above-mentioned and were, therefore, fit and proper to be referred to and decided by arbitration under clause 26 of the contract and that at the time when the action was commenced the defendant was and is still ready and willing to do and concur in all things necessary for causing the said matter to be decided by arbitration.

Under section 5 of the Arbitration Ordinance, 1950, the court has a discretion in relation to such application but it is a discretion which, in the absence of any reason being shown to the contrary, should be exercised in favour of the applicant. This is in accordance with the principle stated in *Lim Su Sang v. Teck Guan Construction and Development Co. Ltd.*[1] in which Thomson L.P. quoted the views of Lord Selborne in the case of *Willesford v. Watson*[2]:—

"If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed, a *prima facie* duty is cast upon the courts to act upon such an agreement."

A similar principle was quoted in *Lan You Timber Co. v. United General Insurance Co. Ltd.*[3]:—

". . . the terms of section 5 mean that the court must hold the parties to their contract, provided they submit to arbitration, unless some sufficient reason, adequate in the circumstances, justifies its setting aside the terms of the contract and then exercising a discretion in favour of allowing the action to proceed. It is, therefore, obvious that the onus is on the person opposing the stay, that is, the present plaintiffs."

The application was opposed by the plaintiff who put forward several grounds why the matter should not be referred to arbitration.

The first ground is that the only dispute to the plaintiff's knowledge arises from the defendant's letter dated 25th October, 1968. (A5). If there were disputes prior to that, the architect should have acted under clause 26 and issued a written decision. Further, the disputes, if any at all, do not fall within the scope of the said clause and are not fit and proper to be referred to arbitration under the said clause.

The architect in his affidavit maintains that disputes have arisen prior to 25th October, 1968, with regard to defects to the building which have been brought to the notice of the plaintiff as evidenced by copies of letters attached to his affidavit and that the plaintiff has failed to rectify the defects arising within the defects liability period in accordance with clause 13 of the contract and which subsist till today. He has tried to convene meetings between the parties to settle claims and counterclaims arising therefrom in order to reach a final sum due to the plaintiff but the plaintiff failed to attend. This is denied by the plaintiff in his affidavit in reply. From documents filed, it is clear that disputes have arisen between the parties and in particular centering around defects to the building not having been fully completed by the plaintiff. They seem to lead to the dispute referred to in the defendant's letter mentioned above and subsequent letter dated 4th December, 1968, which relate to the final sum due to the plaintiff.

What the relevant part of clause 26 of the contract between the parties means is this:—

If there is a dispute or difference arising between the employer or the architect on his behalf and the contractor, then the architect shall determine it by a written decision to the contractor. The dispute or difference must relate to the construction of the contract or to any matter or thing arising thereunder, and must arise either during the progress or after completion of the building. The said written decision of the architect shall be final and binding between the parties unless the contractor within fourteen days of the receipt thereof disputes the same by written notice to the architect who shall then refer the matter to an arbitrator. The award of the arbitrator is final and binding on the parties.

It is clear that the disputes stated above fall within the requirements of this clause.

At this stage two questions arise as regards the architect's position under the arbitration clause, i.e. in the first place, whether he is an arbitrator in the real sense of the word, and, secondly, whether his failure to make a written decision, in the circumstances of this case, disqualifies him from making it at this stage.

Now, the arbitration clause 26 is similar to clause 66 of the I.C.E. standard form of contract, as explained in *Hudson's* Building and Engineering Contracts, Ninth Edition, page 646:—

"There is a requirement that a dispute or difference shall first be referred to the architect or engineer for his decision. . . . Sometimes, also, the arbitration clause requires that notice of arbitration shall be given within a fixed period after receiving the architect's or engineer's preliminary decision. Failure to give notice within this fixed period may act (depending on the wording of the provision) as a bar to any further proceedings."

Further on page 651 it says:—

"It has already been seen that in the I.C.E. form of contract the engineer's decision under clause 66 is a necessary preliminary to arbitration, but his function in this respect is clearly not that of an arbitrator, though his decision is binding on the parties if arbitration is not invoked within a certain period."

In *Re Carus-Wilson and Greene,*[4] Lord Esher M.R. clarifies the position as follows:—

"If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments."

His duty in this regard is further discussed in "Engineering Law and the I.C.E. Contracts" by M.W. Abrahamson on page 212:—

"Whilst not strictly an arbitrator (he is not governed by the Arbitration Act, 1950) he is in an analogous position and is referred to as a quasi-arbitrator. His duty is to give his decision according to his own conscience and according as to what he conceives to be the right as to the work done, and for that

purpose he has no right to obey any order or any suggestion by these people who are called his masters. For that purpose they are not his masters. He has . . . to act fairly and honestly as between them and contractor."

Construing clause 26, it is clear that the architect is not an arbitrator but a quasi-arbitrator who does not fall within the ambit of the Arbitration Ordinance, 1950. By the terms of the clause it is not intended that he has to hold an inquiry in the nature of a judicial inquiry in order to determine the final sum disputed. It might have been necessary for him to get the parties together but as he did not succeed after several attempts, it would not be difficult for him from the records and relevant documents which should be in his possession or available to him as agent for the building owner (defendant), to make a written decision by determining the final sum due and thereby enabling the plaintiff to submit the matter for arbitration within fourteen days of receipt thereof, if the latter disputed it. This he has failed to do. However, his delay or failure to fulfil his obligation under clause 26 does not extend to an application of the principle laid down in *Pawley v. Turnbull*[5] and *Hickman & Co. v. Roberts*[6] which is applied in *Smith Construction Co. Ltd. v. Phit Kirivatna*[7] and relied on by the learned counsel for the plaintiff. Although there is failure by the architect in *Smith's* case cited above and the present case, the facts are entirely different to merit application of this principle. The action of the architect in this regard may be described in the same way as written in *M.W. Abrahamson's* Engineering Law, page 225:—

". . . the engineer and arbitrator must appreciate the special responsibilities of semi-judicial work and avoid doing anything that might reasonably give rise to suspicion that justice is not being done" — "anything at any time which could make fools suspect."

In my view, the architect's conduct in this matter does not amount to disqualification, but it is unnecessary, under the circumstances, for the disputes to be referred back to him for a decision at this stage.

The second ground is that Ex. P6 issued by the architect on 31st October, 1968, is a final certificate for payment which is binding and conclusive and as such the defendant cannot rely on the arbitration clause.

The test that a certificate is final is explained in *Creswell's* Law on Building and Engineering Contracts, Sixth Edition, page 156:—

" 'Completion' and 'final' certificates state that the work has been completed and the contract fulfilled to the satisfaction of the architect or engineer; and that he assures the employer that the contractor is now entitled to payment of the balance of his account, as finally adjusted. This assurance may be expressed in the customary manner or in a particular manner prescribed in the contract in question, but it must be conclusive."

In Ex. P6 although the architect has written "the actual final sum due to the contractor will be $19,951 less $502 = $19,449" it is not conclusive as evidenced by the last paragraph. Payment of the final sum is conditional upon defects being remedied by the contractor and deduction of any P.C. items if paid by the defendant on behalf of the contractor. In other words, the sum of $19,449 is subject to further adjustment by the architect. That being so, Ex. P6 is not a final certificate.

Furthermore, clause 13 of the contract requires the contractor to make good any defects due to materials or workmanship appearing within the defects liability period within a reasonable time after receipt of the architect's written instruction, at his own cost. If this is not complied with, either within the said period or at a later stage, the architect is not bound to issue a final certificate of the value of the works executed by the contractor by virtue of clause 25(f). According to this clause, the architect is only obliged to issue a final certificate either on the expiry of the defects liability period of six months or upon completion of making good defects under clause 13 stated above, whichever is the later. Such final certificate shall be conclusive evidence as to the sufficiency of the said works and materials and the value thereof, save in cases of fraud, dishonesty or fraudulent concealment relating to works or materials which a reasonable examination would not have disclosed.

In this regard, there is also a dispute relating to the defects liability period. The plaintiff in his affidavit contends that all the defects have been rectified by him during the period of 6 months i.e. the defects liability period, and therefore, the architect is obliged under clause 25(f) to issue a final certificate. On the other hand, the architect maintains that defects still subsist and have not been fully rectified as claimed by the plaintiff and as such he is under no obligation to issue the final certificate under the clause.

The plaintiff puts forward further allegations, namely:—

(i) That the defendant has not disclosed the nature of the alleged dispute or difference and that the plaintiff is embarrassed by such vague allegations.

(ii) That a certificate of fitness for occupation of the building was issued by the Pesurohjaya Ibu Kota, Kuala Lumpur, (Ex. P21) on 30th November, 1967, and the defendant is, therefore, estopped from maintaining that defects still exist in the said building.

With regard to (i) above, as explained earlier from the various correspondence between the parties that disputes have arisen, there is

no reason why the plaintiff can say that he is embarrassed by the vague allegations.

As regards (ii), the defence of estoppel has not been specifically pleaded but the certificate of approval by the Municipality, occupation and renting out of the said building by the defendant are stated in the affidavit of the plaintiff. The rule as to pleadings in this respect is explained in *Halsbury's* Laws of England, 3rd Edition, Volume 15, on page 202:—

"Under the modern practice, the facts relied on the establishment of estoppel of any kind (including estoppels *in pais*) should be pleaded or brought to the notice of the tribunal to be affected by it in some other appropriate way, where the trial is without pleadings, in any case in which it is intended to rely upon it, . . . even though the doing so involves a special reply."

The learned counsel for the plaintiff, however, did not go on to classify what kind of estoppel had arisen nor cited any authority in support of it. The certificate (Ex. P21) has, therefore, to be considered from the nature of its contents and for what purpose it is issued. In this regard it is self-explanatory. Nowhere in the Municipal Ordinance or in the Building By-laws is mentioned the requirement to remedy any defects unless they amount to deviations from the approved plans. The certificate appears to have no connection whatsoever with the defects mentioned by the architect in his affidavit nor the "Note" appearing at the bottom of the certificate regarding alterations or additions requiring the written approval of the Municipality relate to rectifying the defects in question. The matter is purely governed by the terms of the contract entered into between the parties and is a contractual obligation on the plaintiff to observe.

The third ground is that from the nature of his affidavit, the architect has become a material witness and it is not therefore proper for him to decide the dispute as arbitrator. In my view, no position is more untenable or unpleasant for any gentleman acting as arbitrator, than to be a witness in the cause. I have stated earlier on this matter that the architect is a quasi-arbitrator and not an arbitrator in the real sense of the word and there is nothing on record to show that the architect is guilty of improper conduct. The principles stated in *Bristol Corporation v. J. Aird & Co.*[8] and in *Freeman & Sons v. Chester Rural District Council*[9] are therefore not applicable.

Now, in the light of the failure to apply a condition precedent, can the defendant still rely on the arbitration clause for the disputes to be submitted to arbitration?

The principles in *Freeman's* case and *Bristol Corporation's* case deal with instances where the architect is the final arbitrator and, although he has become a material witness to the disputes as is in the present case, I am also of the view that they have no application to the matter under discussion.

The principles applicable are discussed in *Hudson's* on page 319 which says:—

". . . once the courts are satisfied that an arbitrator has jurisdiction to go into a matter, they will not allow his findings to be emasculated by any failure of the parties specifically to make necessary procedural provisions for him to give substantive effect to his decision, or by formal difficulties created by the specific provisions of the contract relating to the certifier's decisions."

In *Prestige & Co. Ltd. v. Brettell*[10] Slesser L.J. said:—

"I read the case of *Brodie v. Cardiff Corporation*[11] where this matter was very carefully considered, to mean in substance, this: where an arbitrator having jurisdiction has to decide that something ought to have been done by the architect or engineer which was not done, if the terms of reference are wide enough to enable him to deal with the matter, he may by that decision himself supply the deficiency, and do that which ought to be done."

The difference between the present case and the two English cases stated above is that in the latter the disputes were referred to arbitration and dealt with by the arbitrator whose decision on the material aspects were supported by the Court of Appeal in *Prestige's* case and by the House of Lords in *Brodie's* case. Nevertheless, the principles laid therein are applicable to the present case. In my view, the arbitration clause 26 is wide enough to give jurisdiction to the arbitrator to go into the disputes which have arisen and to supply the deficiency that has occurred, i.e. the non-fulfilment of a condition precedent by the architect.

I am satisfied that the defendant was at the time when the action commenced and is still willing to do and concur in all things necessary for causing the said matters to be decided by arbitration and has stated so in her affidavit. Although she is now temporarily away from the country, I am assured by her counsel that she will be available when the matter goes to arbitration. The plaintiff has failed to show sufficient reason why the disputes should not be referred to arbitration. In the circumstances, the application for stay of proceedings is allowed with costs.

Application allowed.

Solicitors: *K.L. Devaser & Co.; Shearn, Delamore & Co.*